08-5171-cv

Nos. 08-5171-cv (L), 08-5172-cv (xap), 08-5173-cv (xap),
08-5375-cv (xap), 08-5149-cv (con), 08-4639-cv (con)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant,

JANET CALDERO, CELIA I. CALDERON, MARTHA CHELLEMI, SALIH CHIOKE, ANDREW CLEMENT, KRISTEN D'ALESSIO, LAURA DANIELE, CHARMAINE DIDONATO, DAWN L. ELLIS, MARCIA P. JARRETT, MARY KACHADOURIAN, KATHLEEN LUEBKERT, ADELE A. McGREAL, MARGARET McMAHON, MARIANNE MANOUSAKIS, SANDRA D. MORTON, MAUREEN QUINN, HARRY SANTANA, CARL D. SMITH, KIM TATUM, FRANK VALDEZ, and IRENE WOLKIEWICZ,

Intervenors-Appellees-Cross-Appellants,

(For continuation of caption see inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

FINAL BRIEF FOR THE UNITED STATES AS APPELLEE-CROSS-APPELLANT,
AND FOR THE ATTORNEY GENERAL, ASSISTANT ATTORNEY GENERAL,
AND DEPARTMENT OF JUSTICE AS APPELLEES

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Intervenors-Appellees

v.

JOHN BRENNAN, JAMES G. AHEARN, SCOTT SPRING, and DENNIS MORTENSEN,

Intervenors-Appellants-Cross-Appellees,

NEW YORK CITY DEPARTMENT OF EDUCATION; CITY OF NEW YORK; MARTHA K. HIRST, Commissioner, New York City Department of City Administrative Services; NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES,

Defendants-Appellees

No. 08-5149-cv (con)

JOHN BRENNAN, JAMES AHEARN, SCOTT SPRING, DENNIS MORTENSEN, JOHN MITCHELL, and ERIC SCHAUER,

Plaintiffs-Appellants,

v.

ATTORNEY GENERAL OF THE UNITED STATES; ASSISTANT ATTORNEY GENERAL OF THE UNITED STATES FOR CIVIL RIGHTS; U.S. DEPARTMENT OF JUSTICE; NEW YORK CITY DEPARTMENT OF EDUCATION; CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES; MARTHA K. HIRST, Commissioner, New York City Department of City Administrative Services,

Defendants-Appellees,

(For continuation of caption see next page)

(Continuation of caption)

JANET CALDERO, CELIA I. CALDERON, MARTHA CHELLEMI, SALIH CHIOKE, ANDREW CLEMENT, KRISTEN D'ALESSIO, LAURA DANIELE, CHARMAINE DIDONATO, DAWN L. ELLIS, MARCIA P. JARRETT, MARY KACHADOURIAN, KATHLEEN LUEBKERT, ADELE A. McGREAL, MARGARET McMAHON, MARIANNE MANOUSAKIS, SANDRA D. MORTON, MAUREEN QUINN, HARRY SANTANA, CARL D. SMITH, KIM TATUM, FRANK VALDEZ, and IRENE WOLKIEWICZ,

Intervenors-Appellees,

PEDRO ARROYO, JOSE CASADO, CELESTINO FERNANDEZ, KEVIN LaFAYE, STEVEN LOPEZ, ANIBAL MALDONADO, JAMES MARTINEZ, WILBERT McGRAW, SILVIA ORTEGA DE GREEN, and NICHOLAS PANTELIDES,

Intervenors-Appellees

No. 08-4639-cv (con)

RUBEN MIRANDA,

Plaintiff-Appellant

v.

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant-Appellee

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PRELIMINARY STATEMENT

The Brennan appellants'[1] preliminary statement (Br. 1)[2] is complete and correct.

STATEMENT OF JURISDICTION

These appeals arise from three consolidated actions: *United States* v. *New York City Bd. of Educ.*, No. 96-cv-0374 (E.D.N.Y.) (*NYC Board*); *Brennan* v. *Ashcroft*, No. 02-cv-0256 (E.D.N.Y.) (*Brennan*); and *Miranda* v. *New York City Dep't of Educ.*, No. 06-cv-2921 (E.D.N.Y.) (*Miranda*). In *NYC Board*, the United States filed suit against the New York City Board of Education, the City of New York, the City's Department of Personnel, and the Director of the Department of Personnel (collectively the Board) alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Title VII). Joint Appendix (J.A.) 77-90. The district court had jurisdiction under 28 U.S.C. 1331, 1343, and 1345, and 42 U.S.C. 2000e-6(b). In *Brennan*, plaintiffs filed suit against the Board and various federal defendants alleging violations of the Fifth and Fourteenth Amendments, Title VII, and 42 U.S.C. 1981, 1983, and 1985. J.A. 4321-4345. In *Miranda*, plaintiff filed suit against the New York City Department of Education

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[1] The "Brennan appellants" are collectively (1) John Brennan, *et al.*, intervenors-appellants in 2d Cir. Nos. 08-5171, 08-5172, 08-5173, and 08-5375; (2) Brennan, *et al.*, plaintiffs-appellants in No. 08-5149; and (3) Ruben Miranda, plaintiff-appellant in No. 08-4639.

[2] "Br. __" refers to the page number of the Brennan appellants' opening brief. Unless otherwise indicated, "Doc. __" refers to the docket entry number on the district court docket sheet in *NYC Board*.

alleging violations of the Fifth and Fourteenth Amendments, Title VII, and 42 U.S.C. 1981 and 1983. J.A. 4435-4443. In *Brennan* and *Miranda*, the district court had jurisdiction under 28 U.S.C. 1331 and 1343. The court entered final judgment in all three actions on August 26, 2008. Special Appendix (S.A.) 147-158.

Six appeals were filed. In *NYC Board*, the following parties filed notices of appeal: the Brennan intervenors on October 20, 2008; the United States on October 21, 2008; the Board on October 22, 2008; and the Caldero intervenors on November 3, 2008. J.A. 4221-4229. These appeals were timely under Federal Rule of Appellate Procedure 4(a)(1)(B), Rule 4(a)(3), or both. In *Brennan*, plaintiffs filed a notice of appeal on October 20, 2008 (J.A. 4427), which was timely under Rule 4(a)(1)(B). The plaintiff in *Miranda* filed a notice appeal on September 19, 2008 (J.A. 4445), which was timely under Rule 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

BRENNAN APPEAL:

1. Whether the district court erred in upholding awards of retroactive, competitive seniority to testing-claim beneficiaries without first determining whether the challenged employment examinations violated Title VII.

2. Whether the district court applied a proper standard for determining whether beneficiaries are "Hispanic."

UNITED STATES' CROSS-APPEAL:

3. Whether the district court erred in placing the burden on the United States to prove that five minority beneficiaries of the settlement agreement were qualified for the position of custodian or custodian engineer when they took the challenged exams.

4. Whether the district court erred in concluding on summary judgment that Sean Rivera was not a discrimination victim and thus not entitled to retroactive, competitive seniority for layoff purposes.

5. Whether the district court erred in concluding on summary judgment that the United States failed to establish a *prima facie* case of recruitment discrimination under a disparate-impact theory.

6. Whether the awards of retroactive, competitive seniority to non-victim beneficiaries of the settlement agreement violate Title VII or the Equal Protection Clause.

7. Whether the awards of retroactive, competitive seniority to minority beneficiaries of the testing claim violate Title VII or the Equal Protection Clause to the extent that such awards exceed make-whole relief.

8. Whether the district court abused its discretion in holding that minority male beneficiaries of the recruitment claim may not retain any of the competitive seniority that they earned as a result of the permanent appointments they received under the settlement agreement.

STATEMENT OF THE CASE

The United States filed suit in 1996, alleging that the Board violated Title VII by engaging in a pattern or practice of employment discrimination. J.A. 77-85. The United States pursued two claims: (1) a testing claim alleging that the Board's written examinations for the positions of custodian and custodian engineer had a disparate impact on African Americans and Hispanics, and (2) a recruitment claim asserting that the Board's recruiting practices for the custodian and custodian engineer positions had a disparate impact on African Americans, Hispanics, Asians, and women. S.A. 8-9.

In 1999, the United States and the Board reached a settlement, which they submitted to a magistrate judge for approval. J.A. 103-179. A group of incumbent employees (the Brennan intervenors) objected to the settlement and sought intervention. Doc. 127. The magistrate judge denied their intervention motion and approved the settlement agreement. *United States* v. *New York City Bd. of Educ.*, 85 F. Supp. 2d 130 (E.D.N.Y. 2000). This Court vacated that

decision, concluding that the magistrate judge erred in denying intervention. *Brennan* v. *New York City Bd. of Educ.*, 260 F.3d 123 (2d Cir. 2001).

On remand, the Brennan intervenors filed a complaint-in-intervention challenging the legality of the settlement agreement under Title VII, the Fourteenth Amendment, and 42 U.S.C. 1981, 1983, and 1985. J.A. 567-574. The district court ultimately certified the Brennan intervenors' claims as a class action. S.A. 124-125. Two other groups of employees (the Caldero and Arroyo intervenors) intervened to defend the relief they received under the settlement agreement. J.A. 715-717, 779.

In 2002, the Brennan intervenors and a few other employees filed a separate action in *Brennan* raising essentially the same arguments that the Brennan intervenors were pursuing in *NYC Board*. J.A. 4321-4345. The district court consolidated *Brennan* with *NYC Board*. J.A. 719.

In 2006, another employee filed suit in *Miranda*, alleging that he was unlawfully denied transfers in favor of two female custodians who had received seniority awards under the settlement agreement. J.A. 4435-4443. The district court consolidated *Miranda* with *NYC Board* and *Brennan*. J.A. 3993-3995.

The court ultimately upheld some of the seniority awards provided by the settlement agreement, but concluded that others violated Title VII, the Fourteenth Amendment, or both. S.A. 1-150. See pp. 15-20, *infra*. The court issued a

declaratory judgment encompassing those conclusions. S.A. 147-150. It also dismissed the complaints in *Brennan* and *Miranda*, concluding that the seniority awards at issue in those cases were lawful. S.A. 148.

STATEMENT OF FACTS

1. Background

a. Custodians And Custodian Engineers

At the times relevant to this case, custodians and custodian engineers were responsible for the maintenance of buildings in the New York City school system.[3] They supervised a staff of maintenance workers and cleaners and were responsible for cleaning, making repairs, and ensuring that the plumbing, heating, and cooling systems worked properly. J.A. 4350 ¶ 3. During this period, the Board employed more than 900 individuals as custodians or custodian engineers. J.A. 219 ¶ 3.

The two categories of custodians and custodian engineers were "permanent" and "provisional," and the hiring process was different for each category. The Board administered civil service examinations to fill permanent custodian and custodian engineer positions. J.A. 801-804, 864-866, 888-894 (exam notices); J.A. 588-589 ¶¶ 4-5. By contrast, the Board hired provisional custodians and custodian engineers through an interview process that did not require passing an

[3] In 2000, the custodian and custodian engineer positions were combined, and the hiring process was altered. J.A. 592 ¶¶ 14-15. Because these changes are irrelevant here, this brief refers to the pre-2000 job titles and hiring process.

exam. J.A. 590 ¶ 8; J.A. 220-221 ¶¶ 4-11. Provisional custodians and custodian engineers had the same duties, were required to meet the same minimum qualifications, and were subject to the same performance standards as their counterparts who held permanent positions. J.A. 220 (¶ 6), 221-222 (¶ 14); J.A. 3300 (pp. 54, 56); J.A. 3546 (p. 58). Unlike permanent custodians and custodian engineers, however, provisional employees earned no competitive seniority and had no civil service protection. J.A. 1503 n.1; J.A. 589 ¶ 6; J.A. 222 ¶ 15.

In 1997, 91% of *permanent* custodians and custodian engineers were white males, about 8% were minority males, and less than 1% were women. J.A. 2228. In the *provisional* custodian and custodian engineer positions, about 72% of employees were white males, 16% were minority males, and more than 12% were women. *Ibid*.

b. Seniority

A custodial employee's seniority level is important because it determines the order in which layoffs occur and can be a factor in determining whether an employee obtains a transfer to a different school or receives a "temporary care assignment" (an arrangement where the employee takes on custodial duties at another school in addition to his or her regular assignment). See N.Y. Civ. Serv. Law § 80; *Brennan* v. *New York City Bd. of Educ.*, 260 F.3d 123, 127 (2d Cir.

2001); J.A. 222-224 ¶¶ 18-25. The competition for inter-school transfers is particularly important because moving to a larger school typically results in a pay increase. *Brennan*, 260 F.3d at 127; J.A. 222 ¶ 18.

c. Civil Service Exams

This litigation focuses on three exams administered by the Board for permanent positions: Custodian Exams 5040 and 1074 (administered in 1985 and 1993, respectively) and Custodian Engineer Exam 8206 (given in 1989). J.A. 1924-1926 (Responses 37, 41, 45). Each exam had a significant disparate impact on African Americans and Hispanics. J.A. 2170, 2178-2225; S.A. 32-33, 116, 124.

d. Recruitment

The Board relied on and encouraged word-of-mouth advertising as a method of recruitment for the custodian and custodian engineer positions. See J.A. 3539-3542 (pp. 9-11, 13-14, 20); J.A. 3584; J.A. 3627 (pp. 85-87); J.A. 3673-3674 ¶ 14; J.A. 3603 (p. 196); J.A. 2237-2238. When an examination was scheduled, the Board would notify incumbent custodians and custodian engineers, who could then decide which, if any, of their staff would be told about and encouraged to take the test. J.A. 3539-3540 (pp. 9-11, 13); J.A. 3542 (p. 20). Many custodial employees learned about the exams by word of mouth. J.A. 3646 (p. 55); J.A. 3639-3640 (pp. 49-50); J.A. 2418; J.A. 2368; J.A. 2308, 2313, 2325.

Minority employees testified that information about the custodial exams was kept "in-house" and not publicized. J.A. 3647 (pp. 58-59); accord J.A. 3627 (pp. 85-87). Wilbert McGraw, an African-American custodian engineer who had worked 21 years for the Board, explained that "this [custodian job] is very, very private. You don't hear about this job. You don't know about it. * * * There's no advertisement. * * * There's nothing. You have to be in, * * * so to speak, to know what's going on with the in crowd." J.A. 3627 (p. 85). McGraw testified that he had recommended the custodian job to friends "by word of mouth": "[O]therwise they get no information. They don't even know about this job." J.A. 3627 (p. 87); see also J.A. 1945 (report explaining that Board's custodial "hiring is often a closed system, which means that those job opportunities are denied to persons outside the family circles"). This reliance on word-of-mouth recruitment disadvantaged some qualified female and minority candidates who failed to take the exams because they did not learn until after the fact that the tests had been given. J.A. 3651-3653 (pp. 35, 38-41, 98-99); J.A. 3665 (pp. 59-60); J.A. 3673-3674 ¶ 14; J.A. 3685 (pp. 74-75); J.A. 3694 (p. 67).

Since at least 1992, the Board's general practice has been to post notices of civil service exams at four of its administrative buildings. J.A. 3501-3503; J.A.

3567 (Response 2). (As noted, two of the three exams at issue here were administered before 1992.) The Board is uncertain, however, whether it ever posted notices for Exams 5040, 8206, or 1074 in those locations. J.A. 3501-3503.

The Board also claimed that the Department of Personnel mailed notices about civil service exams to agencies and community organizations that had asked to be on a mailing list. J.A. 3517-3518; J.A. 3566-3567 (Response 2). Although the Board stated that this mailing list may have contained up to 3,000 addresses (*ibid.*), the Department of Personnel's 30(b)(6) deponent testified that he was not aware of existing records showing which agencies and organizations were actually mailed notices about Exams 5040, 8206, and 1074. J.A. 1296-1298.

In addition, exam notices for custodial positions sometimes appeared in *The Chief*, a civil service newspaper. J.A. 940-967. But those notices often contained no information about the job duties or required qualifications. *Ibid.*

In the early to mid-1990s, the Board expanded its advertising for provisional custodian and custodian engineer positions. J.A. 3543-3544 (pp. 35, 37-38); J.A. 3504; J.A. 1000 (newspaper ad). That recruitment effort received a "very good response" from minority and female applicants. J.A. 3543-3544 (pp. 37-38); J.A. 3055 (p. 49). Lucien Cappoli, the Board's Chief of School

Custodians, testified that he was surprised at the response from women and had not realized how many of them were qualified for the custodial jobs. J.A. 1554-1556; J.A. 3055 (p. 49).

2. Original Lawsuit And Settlement

In its action against the Board, the United States pursued two claims: (1) a testing claim alleging that Exams 1074, 5040, and 8206 had an unlawful disparate impact on African Americans and Hispanics, and (2) a recruitment claim asserting that the Board's recruiting practices, especially its reliance on word-of-mouth advertising, had an unlawful disparate impact on African Americans, Hispanics, Asians, and women. S.A. 12-13; J.A. 1093.

In 1999, the United States and the Board reached a settlement, which they submitted to a magistrate judge for approval. J.A. 103-179. The disputed portions of the settlement agreement are Paragraphs 13-16, which required the Board to provide relief to 54 named individuals who are African American, Hispanic, Asian, or female. J.A. 107-110 (¶¶ 13-16); J.A. 124-126. Specifically, the agreement required the Board to (1) provide permanent, civil service status to 43 individuals then serving as provisional custodians or custodian engineers, and (2) award retroactive seniority to all 54 beneficiaries (the 43 provisional employees, plus 11 others who were already working as permanent custodians or custodian engineers). J.A. 105 (¶ 4), 107-110 (¶¶ 13-16), 124-126.

When the United States agreed to the settlement, it intended the seniority awards to be make-whole relief to victims of discrimination, not race- or gender-based affirmative action. S.A. 134-135; J.A. 4079-4081, 4083, 4106-4107. In urging the magistrate judge to approve the settlement, the United States asserted that the seniority awards were within "the range of appropriate make-whole relief to victims of discrimination." J.A. 496. As the district court later found, the United States never would have entered into the settlement agreement with the Board had it believed that the seniority awards went beyond make-whole relief to actual victims. S.A. 134-135; J.A. 4106-4107.

The magistrate judge conducted a fairness hearing on the settlement agreement. More than 300 individuals filed objections, including the Brennan intervenors. *United States* v. *New York City Bd. of Educ.*, 85 F. Supp. 2d 130, 134 (E.D.N.Y. 2000). In February 2000, the magistrate judge approved the settlement agreement and denied the Brennan intervenors' motion to intervene. *Id.* at 154-157.

Based on objections at the fairness hearing, the United States and the Board ultimately increased to 59 the number of beneficiaries under the settlement agreement. J.A. 591 ¶ 11. Of these beneficiaries, 32 received seniority based on

the recruitment claim, while the other 27 obtained relief under the testing claim. J.A. 1110-1148.

3. First Appeal

The Brennan intervenors appealed. On appeal, the United States argued that the magistrate judge did not abuse his discretion in denying intervention and that the Brennan intervenors lacked standing to challenge the agreement's constitutionality. U.S. Br. at 23-36, *Brennan*, *supra* (2d Cir. No. 00-6077). In the alternative, the United States argued that the seniority awards were lawful under the Equal Protection Clause. *Id.* at 37-50. In making this argument, the United States asserted that the seniority awards were proper make-whole relief for victims of discrimination. *Id.* at 44-45, 47. As this Court noted, "[t]he government allege[d] that race/ethnicity/gender discrimination prevented the [beneficiaries] from obtaining positions as permanent Custodians and Custodian Engineers and that the remedy provided by the Agreement merely restores them to positions they would have held but for such discrimination." *Brennan*, 260 F.3d at 130.

This Court vacated the magistrate judge's order, concluding that he erred in denying the motion to intervene. *Brennan*, 260 F.3d at 129-133. The Court declined to rule on the legality of the settlement agreement but remanded the

case to allow the Brennan intervenors to pursue their challenge to the seniority awards. *Id.* at 133.

4. Proceedings On Remand

In 2002, the magistrate judge, with the consent of all parties, approved the portions of the settlement agreement that the Brennan intervenors were not challenging. J.A. 575.

In 2003, the United States notified the other parties that it could no longer support the award of retroactive, competitive seniority to all 59 beneficiaries of the settlement agreement. *E.g.*, J.A. 1097-1098, 1110-1148. The United States explained that post-remand discovery had revealed that some beneficiaries were not victims of the Board's testing or recruiting practices and that other beneficiaries, although discrimination victims, received more than make-whole relief. J.A. 1097-1098. Indeed, discovery revealed that several beneficiaries of the recruiting claim benefitted from the recruiting practices challenged by the United States. See, *e.g.*, J.A. 982, 2308-2309, 2313, 2325, 2368, 2418, 2559, 2621.

Of the 59 beneficiaries, the United States asserted that only 31 of them – 27 beneficiaries of the testing claim and four recruitment-claim beneficiaries – were

discrimination victims entitled to retroactive, competitive seniority. J.A. 1110-1148. The United States nonetheless argued that, to the extent non-victim beneficiaries detrimentally relied on the settlement agreement, they should be allowed to retain the permanent civil-service status and *non-competitive*, retroactive seniority they received under the agreement. J.A. 1091-1092, 1098.

Two groups of beneficiaries intervened to defend their awards under the settlement agreement. J.A. 715-717, 779. The Caldero intervenors are beneficiaries of the recruitment claim, while the Arroyo intervenors are testing-claim beneficiaries.

The Brennan, Caldero, and Arroyo intervenors each moved for partial summary judgment. J.A. 785-786, 2751-2752, 2875-2876. The United States opposed all of those motions. J.A. 1649-1682, 2657-2679.

5. District Court's Decisions

The district court issued several opinions addressing the intervenors' motions. These are the relevant rulings:

a. The district court concluded, and the Brennan intervenors conceded, that Exams 1074 and 5040 had a disparate impact on African Americans and Hispanics and that Exam 8206 had a disparate impact on African Americans. S.A. 32, 47-49; J.A. 789. This disparate impact, according to the court, established a *prima facie*

case of unlawful discrimination under Title VII. S.A. 47. After an evidentiary hearing, the district court also found "a strong basis in evidence – that is, evidence approaching a *prima facie* case – that [Exam 8206] had a disparate impact on Hispanics." S.A. 116, 124.

b. The district court denied the Brennan intervenors an opportunity to defend the legality of the challenged exams under Title VII. The Brennan intervenors argued that all three exams were job-related, consistent with business necessity, supported by a legitimate "business justification," and thus lawful under 42 U.S.C. 2000e-2(k) and *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 659-660 (1989).[4] J.A. 1521-1523; J.A. 1411-1415 ¶¶ 13-21. The court refused to allow the Brennan intervenors to pursue these defenses, suggesting that only an employer had standing to do so. S.A. 49-50 n.37.

c. Relying on an affirmative-action theory, the district court held that Title VII and the Equal Protection Clause permitted the testing-claim beneficiaries to receive retroactive, competitive seniority for purposes of transfers and temporary care assignments, regardless of whether they were discrimination victims. S.A. 47-50, 55-67, 72-75, 88, 90, 124-125. As for layoffs, however, the court held that

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[4] The Brennan intervenors argued that the *Wards Cove* "business justification" standard – rather than the job-relatedness/business necessity test codified in the 1991 amendments to Title VII, see 42 U.S.C. 2000e-2(k) – applied to the Board's pre-1991 actions. See J.A. 1523 n.14.

"the grant of seniority benefits to beneficiaries who are not victims of discrimination violates Title VII and the Fourteenth Amendment." S.A. 90; see *id.* at 59-63, 75-78.

d. The district court concluded on summary judgment that the evidence was insufficient to prove that any of the recruitment-claim beneficiaries was a discrimination victim. S.A. 101 n.3, 120-121. In reaching this conclusion, the court held that the United States did not establish a causal link between the Board's recruiting practices and the statistical shortfall of minorities and women in the applicant pool for custodian and custodian engineer positions. S.A. 66-67. Thus, according to the court, the government failed to establish a *prima facie* case of recruitment discrimination under a disparate-impact theory. S.A. 120.

e. Applying strict scrutiny, the district court held that the Equal Protection Clause barred the award of any competitive seniority to minority male beneficiaries of the recruiting claim. S.A. 7, 88, 90, 135-137 & n.5. As a result of the court's ruling, those beneficiaries will not receive any of the competitive seniority they were awarded under the settlement agreement. S.A. 135-137 & n.5; S.A. 88. This includes both retroactive seniority and the non-retroactive

"appointment-date seniority" that they began earning when they were appointed to permanent positions under the agreement. J.A. 4128; S.A. 121-123.

f. The district court reached a different conclusion regarding the female beneficiaries of the recruiting claim. Analyzing the settlement agreement as gender-based affirmative action under intermediate-level scrutiny, the court held that both the Equal Protection Clause and Title VII permitted the award of retroactive, competitive seniority to female beneficiaries for purposes of transfers and temporary care assignments. S.A. 7, 50-52, 78-82, 88, 90. The court concluded, however, that Title VII barred the award of retroactive seniority to non-victim female beneficiaries for purposes of layoffs. S.A. 7, 59-64, 88, 90.

g. The court also held that nine beneficiaries of the testing claim were "actual victims" of discrimination entitled to retroactive, competitive seniority for all purposes, including layoffs. S.A. 88, 144.[5] The court reached this conclusion in two steps. First, the court erroneously asserted (see Br. 39, 56) that the Brennan intervenors had conceded that seven of these testing-claim beneficiaries were discrimination victims who received appropriate make-whole relief under the settlement agreement. S.A. 34, 137-138. Later, after supplemental briefing by the

[5] The nine beneficiaries are Lloyd Bailey, Joseph Christie, Ricardo Cordero, Belfield Lashley, Vernon Marshall, Gilbert Rivera, Peter Robertin, Felix Torres, and Mayla Zephrini. S.A. 34, 144.

parties, the court held that two more testing-claim beneficiaries were victims of discrimination. S.A. 140-141, 144.

h. The court ruled on summary judgment that six other beneficiaries of the testing claim – Thomas Fields, Carla Lambert, Angel Pagan, Anthony Pantelides, Sean Rivera, and Luis Torres – were not discrimination victims and thus not entitled to retroactive, competitive seniority for layoff purposes. S.A. 144. The court held that the United States had the burden of proving that each of the six was a discrimination victim and that it had failed to produce sufficient evidence to avoid summary judgment on this issue. S.A. 139-140, 142-144. Although, under the court's ruling, these six beneficiaries will get no retroactive seniority for layoff purposes, they will retain their retroactive seniority for purposes of transfers and temporary care assignments under the court's affirmative-action theory. S.A. 130, 143, 145.

i. The district court concluded that Anthony and Nicholas Pantelides, whose mother was born in Puerto Rico, are "Hispanic" and thus qualify for relief under the settlement agreement. S.A. 41-42; see S.A. 149.

j. The court approved a stipulation adjusting the layoff seniority dates for ten testing-claim beneficiaries, without deciding whether they were victims of discrimination. J.A. 4211-4213. Although the stipulation signed by the parties originally covered 11 beneficiaries, the district court struck Andrew Clement from

the stipulation after concluding that he was a recruitment-claim beneficiary and thus not entitled to competitive seniority under the settlement agreement. S.A. 136, 138 & n.7.

The stipulation obviates the need, at least temporarily, to decide whether the ten beneficiaries are discrimination victims. The stipulation adjusts the seniority dates for those individuals for layoff purposes only. J.A. 4212 ¶ 1. The affected beneficiaries agreed to forgo an evidentiary hearing on "actual victim" status unless this Court or the Supreme Court concludes that such status is relevant to the lawfulness of the seniority awards those beneficiaries received under the settlement agreement. *Id.* at ¶ 4. In that event, the stipulated seniority dates would no longer apply. J.A. 4213 ¶ 5.

SUMMARY OF ARGUMENT

This Court should affirm the district court's judgment with respect to Issue 2, and vacate the judgment as to the remaining issues and remand for further proceedings, including evidentiary hearings on the testing and recruiting claims.

Brennan Appeal

1. The district court held that nine beneficiaries of the testing claim were "actual victims" of discrimination entitled to retroactive, competitive seniority for all purposes. The Brennan appellants argue that the court could not properly

determine that these beneficiaries were discrimination victims without first deciding whether the challenged exams violated Title VII.

Although the United States contends that these nine beneficiaries are discrimination victims, we concede that the court erred in failing to decide whether the exams were unlawful. The Brennan appellants are entitled to step into the shoes of their employer to try to defend the challenged exams. The evidence raises a genuine issue of material fact as to the exams' legality, and thus an evidentiary hearing is required.

2. Contrary to the Brennan appellants' argument, the district court applied a proper standard to determine whether beneficiaries qualified as Hispanic. The court relied on a federal regulation defining "national origin discrimination" to include denials of equal employment opportunity because of the "place of origin" of an individual's ancestors. That definition is consistent with the Supreme Court's interpretation of "national origin" and with Congress's intent in enacting Title VII.

United States' Cross-Appeal

3. The district court improperly placed the burden on the United States to prove that five beneficiaries were victims of testing discrimination. The United States alleged a pattern or practice of discrimination against the Board. In pattern-or-practice cases, once it is determined that a violation of Title VII occurred, the

burden shifts to the party challenging relief to prove that job applicants were not victims of that discrimination. The evidence in this case is insufficient, on summary judgment, to satisfy the Brennan appellants' burden of proving that the five individuals were not discrimination victims.

4. The district court erred in concluding on summary judgment that beneficiary Sean Rivera, who is Hispanic, was not a discrimination victim. Although he passed one of the challenged exams and was eventually hired, his hiring was delayed because of the disparate impact of the test. The scores of Hispanics who took the exam were clustered disproportionately at the low end of the scoring range, meaning that if Hispanic candidates were hired at all, they likely would be appointed later than the average white candidate. This evidence supported the United States' position that Rivera was a discrimination victim and precluded summary judgment for the Brennan appellants on this issue.

5. The district court erred in concluding on summary judgment that the United States failed to establish a *prima facie* case of recruitment discrimination. The court held that the United States did not establish a causal connection between the Board's recruitment practices and the statistical disparities in the applicant pool. The United States' expert created a statistical model designed to determine the pool of potential candidates who were both interested in and qualified for the positions in question. Other parties' experts supported this methodology. This

statistical analysis, in combination with anecdotal evidence, raised an inference of causation that precluded summary judgment.

6. The district court upheld the awards of retroactive, competitive seniority for purposes of transfers and temporary care assignments to 18 female beneficiaries of the recruitment claim, despite concluding that the evidence was insufficient to show that any of them was a discrimination victim. The United States believes that 16 of the 18 are not victims.

In the context of this case, the awards of retroactive, competitive seniority to these non-victims violate the Equal Protection Clause and Title VII. Such awards are not substantially related to the goal of remedying discrimination and they unnecessarily trammel the interests of innocent third parties. As a result of the court's ruling, several non-victims have unjustifiably received more seniority than both actual victims of discrimination and female and minority employees who are not beneficiaries of the settlement agreement. Moreover, some of the non-victims benefitted from the very recruiting practices that the United States challenged in this action.

7. Twelve testing-claim beneficiaries received retroactive, competitive seniority dates that are earlier than the dates necessary to make them whole for the discrimination they suffered. Relying on an affirmative-action theory, the district

court upheld these seniority awards for purposes of transfers and temporary care assignments.

To the extent the awards to the 12 beneficiaries exceed make-whole relief, they violate the Equal Protection Clause and Title VII. Such awards are not narrowly tailored to further the Board's compelling interest in remedying past discrimination, and they unnecessarily trammel the interests of innocent employees, including other discrimination victims and female and minority incumbents who are not beneficiaries of the settlement agreement.

8. The district court abused its discretion in stripping male recruitment-claim beneficiaries of *all* of the *non-retroactive*, competitive seniority that they began earning when they received their permanent appointments under the settlement agreement. The court's ruling appears to preclude these beneficiaries from ever accruing competitive seniority as long as they remain in their current positions. This result unjustly and unnecessarily penalizes innocent beneficiaries, several of whom detrimentally relied on the relief they received under the agreement. Precluding these beneficiaries from having any competitive seniority is unnecessary to remedy any injuries that the Brennan appellants may have suffered.

ARGUMENT

STANDARDS OF REVIEW

Issues 1-7 in this brief are reviewed *de novo*. The Court decided these issues on the intervenors' cross-motions for summary judgment. The United States did not seek summary judgment. This Court "review[s] the grant of summary judgment *de novo*." *Catlin* v. *Sobol*, 93 F.3d 1112, 1116 (2d Cir. 1996). "A motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Ibid*. "If there is any evidence in the record from which a reasonable inference could be drawn in favor of the non-moving party on a material issue of fact, summary judgment is improper." *Ibid*. This Court also reviews *de novo* "questions of law that the district court addressed on cross-motions for summary judgment." *Estate of Landers* v. *Leavitt*, 545 F.3d 98, 105 (2d Cir. 2008).

Issue 8, which involves the district court's holding that some beneficiaries are not entitled to retain any of their competitive seniority, is reviewed for abuse of discretion. See *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 376 (1977).

I

THE DISTRICT COURT ERRED IN REFUSING TO HOLD AN EVIDENTIARY HEARING TO DETERMINE WHETHER THE CHALLENGED EXAMS VIOLATED TITLE VII

The district court held that nine beneficiaries of the testing claim were "actual victims" of discrimination and thus entitled to retroactive, competitive seniority for all purposes, including layoffs. The Brennan appellants contend (Br. 56-57) that the district court could not properly determine that any beneficiaries were actual victims without first deciding whether the challenged exams violated Title VII.

The United States concedes that the district court erred in this regard. The court skipped a necessary step in the analysis by failing to determine whether the challenged exams violated Title VII. Because there were disputed issues of material fact regarding the lawfulness of the exams, summary judgment was inappropriate and an evidentiary hearing was required.

A. The Brennan Appellants Are Entitled To An Opportunity To Try To Defend The Lawfulness Of The Exams

The Brennan appellants asserted below that each of the exams was job-related and consistent with business necessity, 42 U.S.C. 2000e-2(k), and supported by a legitimate "business justification," *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 659-660 (1989). See p. 16 n.4, *supra*. In refusing to allow the Brennan appellants to pursue these defenses, the district court reasoned that,

"[a]lthough in a non-affirmative-action case, *employers* may defeat a disparate-impact claim by demonstrating that their challenged practice is consistent with business necessity, it is ludicrous to argue that when an employer takes action to rectify past discrimination it is acting contrary to its business needs." S.A. 49-50 n.37 (citation omitted). The United States agrees that the district court erred in refusing to give the Brennan appellants an opportunity to try to defend the challenged exams.

Where (as here) a settlement agreement affects contractual rights of incumbent employees, those incumbents should be allowed to step into the shoes of their employer to raise defenses that the employer, by settling the case, has abandoned. *United States* v. *City of Hialeah*, 140 F.3d 968, 978-984 (11th Cir. 1998). The decision in *Kirkland* v. *New York State Department of Correctional Services*, 711 F.2d 1117 (2d Cir. 1983), cert. denied, 465 U.S. 1005 (1984), supports this conclusion. In *Kirkland*, this Court held that if a plaintiff and an employer settle a Title VII lawsuit involving a disparate-impact challenge to employment exams, incumbent employees who oppose the settlement cannot force a trial on the job-relatedness of the exams *if the settlement does not impair the incumbents' contractual or other property rights*. *Id.* at 1126-1131, 1134. Unlike the settlement in *Kirkland*, the awards of retroactive seniority in the present case *do* impair incumbents' contractual rights. See J.A. 989-990 (collective bargaining

agreement). As this Court recognized in the earlier appeal in this case, "[s]eniority is a contractual right." *Brennan* v. *New York City Bd. of Educ.*, 260 F.3d 123, 131 (2d Cir. 2001) (internal quotation marks omitted).

Therefore, because the Brennan appellants asserted that all three exams were lawful, the district court was required to decide the question of the tests' legality before determining whether beneficiaries who took those exams were actual victims. As the Brennan appellants point out (Br. 57), none of the beneficiaries could be an "actual victim" of testing discrimination unless at least one of the exams was unlawful.

Finally, the district court's decision is in tension with this Court's mandate in the previous appeal. In remanding the case, this Court ordered that the Brennan intervenors "be accorded discovery and other rights with regard to their claim that any impairment by the Agreement of their interests * * * in their seniority rights as Custodians and Custodian Engineers would constitute impermissible discrimination rather than *a proper restorative remedy based on past discrimination against the [beneficiaries]*." *Brennan*, 260 F.3d at 133 (emphasis added). Presumably, this Court did not intend such discovery to be a meaningless exercise. Thus, implicit in this Court's mandate is the understanding that the district court would adjudicate the question of whether the Board's use of the challenged exams actually "discriminat[ed] against the [beneficiaries]." *Ibid.*

B. An Evidentiary Hearing Is Required

The evidence raises a genuine issue of material fact on the question of whether the challenged exams are job-related, consistent with business necessity, or otherwise supported by a legitimate business justification. The United States believes they are not, and it produced evidence, including expert reports, supporting its position. *E.g.*, J.A. 1962-1994, 1996-2098, 2101-2140, 2162-2166. The Brennan appellants countered with their own expert evidence on these issues. J.A. 1405-1437. This factual dispute necessitates an evidentiary hearing.

The Brennan appellants suggest, however, that the district court should have granted summary judgment *in their favor* on the question of the exams' lawfulness because the United States' expert reports were unsworn and thus (according to the Brennan appellants) not competent evidence. Br. 57-58. This contention is meritless.

Any technical defect that might have occurred by the failure to submit declarations with the expert reports was cured by the sworn testimony of the experts who prepared those reports. Each of the expert reports at issue was co-authored by either Dr. Neal Schmitt or Dr. Bernard Siskin, both of whom testified under oath at depositions about their reports. J.A. 2972-2978, 2984-2998.

But even if those experts had not testified under oath, the failure to submit declarations would not justify summary judgment in the Brennan appellants' favor. As this Court has explained, "when the evidence offered in opposition to [a motion or cross-motion for summary judgment] is defective in form but is sufficient to apprise the court that there is important and relevant information that could be proffered to defeat the motion, summary judgment ought not to be entered." *Liberty Mut. Ins. Co.* v. *Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1389 (2d Cir. 1992) (citation omitted; brackets in original). In those circumstances, the district court should give the non-movant an opportunity to correct the procedural defect. *Ibid.* Here, the United States' introduction of expert reports put the district court on notice that relevant evidence was available to create a genuine issue of material fact on the job-relatedness/business necessity question. Moreover, assuming that the United States was required to submit declarations with the expert reports, the government can easily cure the alleged defect on remand by simply resubmitting the reports with declarations attached. See *Harnden* v. *Jayco, Inc.*, 496 F.3d 579, 583 (6th Cir. 2007) (holding that admission of unsworn expert report was "harmless error" because "sending this case back to the district court will simply result in the affidavit being re-submitted in admissible form").

For these reasons, summary judgment is inappropriate on the question of the exams' legality. Genuine issues of material fact exist necessitating an evidentiary hearing on this issue.

II

THE DISTRICT COURT APPLIED A PROPER STANDARD FOR DETERMINING WHETHER BENEFICIARIES ARE "HISPANIC"

Regulations promulgated by the Equal Employment Opportunity Commission (EEOC) define "Hispanic" as "including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race." 29 C.F.R. 1607.4(B). In addition, the EEOC's regulations "define[] national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, *or his or her ancestor's, place of origin*; or because an individual has the physical, cultural or linguistic characteristics of a national origin group." 29 C.F.R. 1606.1 (emphasis added).

The district court relied on the EEOC's definition of national origin discrimination in resolving disputes about whether beneficiaries were "Hispanic." S.A. 41-42. With regard to brothers Anthony and Nicholas Pantelides, the court held that, because their mother was born in Puerto Rico, they qualified as Hispanic and thus were entitled to relief under the settlement agreement. *Id.* at 42; see J.A.

1060 (birth certificate showing that the Pantelides' mother, Myriam Perocier Rivera, was born in Puerto Rico of Puerto Rican parents).

The Brennan appellants argue (Br. 78-79) that the district court erred in relying on the EEOC's definition of national origin discrimination in concluding that the Pantelides are Hispanic. Specifically, the Brennan appellants claim that the court placed too much emphasis on the birth place of the Pantelides' mother, rather than on whether the brothers self-identified as Hispanic or had ties to Hispanic culture. This argument is meritless.

The district court properly relied on the EEOC's definition, which comports with the Supreme Court's interpretation of "national origin" under Title VII. See *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 88 (1973) ("The term 'national origin' on its face refers to the country where a person was born, or, more broadly, *the country from which his or her ancestors came*.") (emphasis added). It is also consistent with congressional intent. See *ibid.* (emphasizing subcommittee chairman's explanation that "national origin" "means the country from which you or your forebears came") (quoting 110 Cong. Rec. 2549 (1964) (Rep. Roosevelt)).

The Brennan appellants assert (Br. 78) that the EEOC definition covers only intentional discrimination, but that contention is refuted by the plain language of the EEOC regulations. The definition applies to the EEOC "Guidelines on Discrimination Because of National Origin," 29 C.F.R. Pt. 1606, which expressly

cover disparate-impact claims involving employee selection procedures. 29 C.F.R. 1606.6. Indeed, the section containing the definition of "national origin discrimination" explicitly refers to the "adverse impact" theory of liability. 29 C.F.R. 1606.1. The Brennan appellants nonetheless assert (Br. 78) that the phrase "because of" in the EEOC's definition necessarily refers exclusively to intentional discrimination. But that argument overlooks the fact that Section 703(a)(2) of Title VII – the portion of the statute that the Supreme Court has interpreted to prohibit disparate-impact discrimination, *Smith* v. *City of Jackson*, 544 U.S. 228, 234-236 (2005) – also uses the phrase "*because of* * * * national origin" in describing prohibited conduct. 42 U.S.C. 2000e-2(a)(2) (emphasis added).

At any rate, the Pantelides' status as Hispanic does not rest solely on their mother's place of birth. Their mother spoke Spanish, and the brothers were raised in an "Hispanic household." J.A. 3396-3397.

Both men self-identified as Hispanic on three forms that they each submitted to the Board in 1994 and 1997 – well before the parties reached their settlement in 1999. J.A. 1074. (Anthony Pantelides also identified himself as Hispanic on a form submitted in 1993. *Ibid*.). To be sure, both brothers submitted forms to the Board (in 1985, 1991, and either 1995 or 1996) identifying themselves as white and non-Hispanic. J.A. 1074, 4271-4272; J.A. 1499 ¶¶ 177-

178; J.A. 2911 ¶¶ 177-178. But Anthony Pantelides explained this discrepancy: He had identified himself as non-Hispanic on some forms because, especially in the early years of his employment with the Board, he had witnessed anti-Hispanic bias and feared he would face such discrimination if he revealed his ethnicity. J.A. 3386-3387, 3389-3390. Nicholas Pantelides' reluctance to reveal his Hispanic heritage is also understandable. He testified that, in 1995, while working for the Board, he was subjected to anti-Hispanic slurs by supervisors. J.A. 3403-3404; J.A. 1591. In combination, this evidence is more than sufficient to establish that the Pantelides brothers are Hispanic.

III

THE DISTRICT COURT ERRONEOUSLY PLACED THE BURDEN ON THE UNITED STATES TO PROVE THAT FIVE TESTING-CLAIM BENEFICIARIES WERE QUALIFIED FOR THE POSITIONS IN QUESTION

(Cross-Appeal)

The district court erroneously placed the burden on the United States to prove that five minority beneficiaries of the settlement agreement – Thomas Fields, Carla Lambert, Angel Pagan, Anthony Pantelides, and Luis Torres – were victims of testing discrimination. If the district court concludes on remand (as it should) that the challenged exams violate Title VII (see pp. 26-31, *supra*), the burden will be on the Brennan appellants to prove that the testing-claim beneficiaries were not discrimination victims.

A. Background

When individuals applied to take one of the challenged exams, they were required to fill out an "experience paper," a form on which the applicant was asked to list work experience and education. *E.g.*, J.A. 4273-4274; see J.A. 893. After an exam was given, the City's Department of Personnel reviewed the experience papers of individuals who *passed* the test to determine whether they met the job qualifications. J.A. 3175-3177, 3182-3183, 3199-3200. If the City determined that an individual was unqualified, he or she had a right to appeal to the Department of Personnel and, if that was unsuccessful, to the New York City Civil Service Commission. J.A. 3178-3181, 3184-3185. During this appeal process, individuals were allowed to submit additional documentation concerning their qualifications and could clarify or elaborate upon the information provided in the experience papers. J.A. 3185-3186, 3204-3205, 3210.

A significant percentage of test passers who were initially found unqualified successfully overturned that determination on appeal. On Exam 8206, for example, 23 (or 41%) of the 56 test passers originally rated unqualified were ultimately deemed qualified and placed on the eligibility list. J.A. 2919-2920 ¶¶ 34-36; J.A. 3471 ¶¶ 34-35. Of the 132 individuals who passed Exam 5040 but

were initially found unqualified, 28 (or 21%) won their appeals. J.A. 2917 ¶ 16; J.A. 3470 ¶ 16.

The City did not typically conduct such a review of the experience papers of individuals who *failed* the exams. J.A. 1319. But in 1997 (12 years after Exam 5040 was administered and eight years after Exam 8206 was given), the City undertook a *post-hoc* review of the experience papers of those who failed the challenged tests. This review was designed to help the Board prepare a defense to this lawsuit. J.A. 1319; J.A. 1314. In determining whether test failers met the minimum requirements, the City relied solely on a review of their experience papers and did not contact those individuals to seek clarification or to allow them to provide additional information. J.A. 3122-3123 (Responses 174-179). In contrast to the contemporaneous review of the qualifications of test passers, the *post-hoc* review did not include any process to appeal a finding of "not qualified." J.A. 3121-3122 (Responses 171-173).

During this *post-hoc* review, the City determined that several individuals did not meet the minimum job qualifications when they took the tests. Among these individuals were the five beneficiaries at issue here: Fields, Lambert, Pagan, Pantelides, and Torres. The Board later conceded that it did not know whether the *post-hoc* review accurately assessed the test failers' actual qualifications. J.A. 3733-3734 (Response 9). All beneficiaries who were found unqualified during

this *post-hoc* review had successfully performed as provisional custodians or custodian engineers before their permanent appointments. J.A. 1933-1934 ¶¶ 2-5; J.A. 1935-1937.

The United States' expert, Dr. Bernard Siskin, testified at an evidentiary hearing that this *post-hoc* review of test-failers' qualifications was unreliable. He based this conclusion on the following factors: (1) the test failers who were found unqualified were not allowed to appeal that determination, an option that the City made available to test passers who were rated unqualified during the City's usual, contemporaneous review process; (2) a significant proportion of test passers who were found unqualified had successfully challenged those determinations on appeal; and (3) the *post-hoc* review may have been biased in favor of finding individuals unqualified because the Board conducted the review for purposes of litigation. S.A. 105 & n.6; 11/21/06 Hearing Tr. 24, 31-32; S.A. 33; J.A. 2146. The district court "credit[ed] Dr. Siskin's opinion, which was not challenged by [the Brennan intervenors' expert], that the reliability of that [*post-hoc*] review was undermined by the fact that a significant number of test-passers succeeded in getting an adverse qualifications determination overturned." S.A. 110 n.10.

Nonetheless, the district court granted summary judgment to the Brennan intervenors on the issue of the five beneficiaries' qualifications. S.A. 141-144. At

the outset, the court held that the United States and the Board "bear the burden of proof" on the question of "whether the retroactive seniority [these beneficiaries] received approximately corresponds to the seniority they would have received but for the discriminatory exams." S.A. 139. The court then concluded that the United States and the Board "failed to discharge their burden of proof" and "failed to offer evidence to warrant a factual hearing on [the beneficiaries'] actual-victim status." S.A. 140, 144. The court acknowledged that the City's 1997 "*post hoc* review is not infallible because, unlike test passers, test failers were not given the opportunity to appeal an adverse determination." S.A. 142. But the court nonetheless ruled in favor of the Brennan intervenors, asserting that "neither the United States nor the Board has offered any concrete evidence that the *post hoc* review was incorrect as to any of the five whose qualifications are challenged." S.A. 142; see also S.A. 143 n.11.

B. The Brennan Appellants Have The Burden Of Proof

The United States' lawsuit against the Board alleged an unlawful pattern or practice of employment discrimination under Title VII. The framework for analyzing pattern-or-practice cases is set forth in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). As relevant here, *Teamsters* establishes a procedure for determining which individuals are entitled to relief if the government proves a pattern-or-practice violation. *Id.* at 361-362.

"The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." *Teamsters*, 431 U.S. at 362. "The Government need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination." *Ibid.* (footnote omitted). If that showing is made, the burden then shifts to the employer "to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Ibid.* One way a defendant may meet its burden of proof is to show that, apart from the challenged employment practice, the individual was unqualified for the job in question or that no vacancy existed during the relevant period. *Id.* at 370 n.53; *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 773 n.32 (1976). Although *Teamsters* involved claims of disparate treatment, this Court applies the same burden-shifting framework to cases in which a plaintiff has proved a Title VII violation under a disparate-impact theory. *Robinson* v. *Metro-North Commuter R.R. Co.*, 267 F.3d 147, 159-162 (2d Cir. 2001), cert. denied, 535 U.S. 951 (2002).

In a typical pattern-or-practice case, the party challenging an individual's entitlement to relief is the employer who committed the discrimination. Under those circumstances, the burden shifts to the employer to prove that an individual

affected by the discriminatory employment practice is not eligible for relief. *Teamsters*, 431 U.S. at 361-362; *Franks*, 424 U.S. at 772-773.

Even though the Brennan appellants are not employers and did not commit the discrimination at issue in this case, the *Teamsters* burden-shifting nonetheless applies here. The Fifth Circuit correctly applied the *Teamsters* presumption under analogous circumstances in *United States* v. *East Texas Motor Freight, Inc.*, 643 F.2d 304 (5th Cir. 1981). In that case, the United States reached a settlement with the defendant employer, which had engaged in a pattern or practice of discrimination in violation of Title VII. An employee union challenged awards of retroactive seniority to alleged victims of the employer's discrimination. Even though it was the employer that had engaged in the discrimination, the Fifth Circuit placed the burden on the union to rebut the *Teamsters* presumption. As that court explained, "the effect of the [*Teamsters*] presumption is to *shift the burden to the party opposing retroactive seniority* 'to demonstrate that the individual applicant was denied * * * an employment opportunity for lawful reasons.'" *Id.* at 306 (emphasis added and citation omitted). The court upheld the award of retroactive seniority, emphasizing that "the union has not attempted to rebut this presumption with evidence that [the alleged victims] would have been refused * * * employment for lawful reasons had they applied." *Id.* at 308; see also *Bockman* v. *Lucky Stores, Inc.*, No. CIV S 83-039, 1986 WL 10821, at *7-8

(E.D. Cal. Aug. 11, 1986) (placing *Teamsters* burden of proof on union opposing relief authorized by settlement between government and defendant employer, even though union had not been found to have discriminated), aff'd, 826 F.2d 1069 (9th Cir. 1987) (Table).

Placing the *Teamsters* presumption on the Brennan appellants is consistent with their contention that they should be allowed to step into the shoes of the Board to raise defenses that the employer, by settling the case, has abandoned. See pp. 27-28, *supra*. If an intervenor is allowed to step into the employer's shoes to mount a defense, logic dictates that the intervenor also should take on the same burdens that the employer would have faced had it litigated, instead of settled, the case. Such burdens should include rebutting the *Teamsters* presumption.

Instead of applying the *Teamsters* presumption, the district court erroneously relied on *Johnson* v. *California*, 543 U.S. 499 (2005), which states that "[u]nder strict scrutiny, the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.'" *Id.* at 505 (citation omitted). S.A. 139. *Johnson*, which involved a policy of segregating prison inmates by race, is inapposite here. The classification at issue in *Johnson* was indisputably race-based. By contrast, the United States argued below that the awards of seniority to the five beneficiaries were not race-based classifications but, instead, appropriate make-whole relief to

discrimination victims. The burden imposed by *Johnson* does not apply to the threshold question of whether individual beneficiaries are discrimination victims. On that issue, the Brennan appellants bear the burden of proof under *Teamsters* once it is determined that the challenged exams violate Title VII.

The evidence is insufficient, on a motion for summary judgment, to satisfy the Brennan appellants' burden of proving that the five beneficiaries were not qualified for the positions in question when they took the challenged exams. The mere fact that the five beneficiaries were designated as "unqualified" during the Board's 1997 *post-hoc* review does not establish that they lacked the necessary qualifications. The United States presented expert evidence, which the district court credited, that the Board's *post-hoc* review was unreliable. First, the *post-hoc* review provided no opportunity for test failers to appeal the determinations that they were unqualified. The absence of an appeal process for test failers is especially significant because a substantial proportion of the test passers who were rated unqualified during a contemporaneous review successfully challenged that determination on appeal. Second, the *post-hoc* review was susceptible to bias because it was conducted for purposes of litigation. Cf. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 433 n.32 (1975) (studies conducted by party for purposes of litigation "must be examined with great care").

Any review of the beneficiaries' qualifications based solely on their experience papers is flawed because, if afforded the same right of appeal granted to test passers, the beneficiaries would be allowed to supplement the record regarding their qualifications and to clarify the answers provided in their experience papers. The Brennan appellants did not produce evidence showing that the beneficiaries would still be deemed unqualified if given an opportunity to provide supplemental information and clarify their experience papers.

Finally, the Brennan appellants contend (Br. 58-59) that it is "entirely speculative" whether any of the beneficiaries would have fared better if the Board had used different selection devices or whether they would have been hired even if they performed well on those alternative devices. Because the Brennan appellants bear the burden of proving that the beneficiaries were not victims of discrimination, uncertainties about what would have happened in the absence of discriminatory exams must be resolved against the Brennan appellants.

For these reasons, the district court erred in granting summary judgment in favor of the Brennan appellants on the question of the five beneficiaries' qualifications. This Court should remand for an evidentiary hearing on this issue.

IV

THE DISTRICT COURT ERRED IN HOLDING, ON SUMMARY JUDGMENT, THAT SEAN RIVERA WAS NOT A VICTIM OF DISCRIMINATION AND THUS NOT ENTITLED TO RETROACTIVE, COMPETITIVE SENIORITY

(Cross-Appeal)

The district court erred in ruling, on summary judgment, that Sean Rivera was not a victim of discrimination. Rivera is an Hispanic beneficiary who took Custodian Exam 1074. Although he passed the test, his score was relatively low and, as a result, he was not hired as a permanent custodian until February 4, 2000, more than 27 months after the median hire date for that exam. S.A. 141. Because of this delay in his hiring, Rivera is a discrimination victim entitled to make-whole relief. At the very least, there were disputed issues of material fact that precluded summary judgment on this issue.

A. Background

The United States produced expert evidence that Exam 1074 had a disparate impact on Hispanics, not just in the test's pass rate but also in the score distributions. J.A. 2170, 2181-2183, 2187-2190, 2195-2198. Hispanic candidates' scores were, on average, about 11 points lower than those of white test-takers – a disparity that the United States' experts found was "overwhelmingly statistically significant." J.A. 2181, 2187.

The district court rejected the United States' claim that Rivera was a discrimination victim. The United States argued that if the test had not been discriminatory, Rivera would have scored higher and been hired earlier. Rejecting this claim as "purely speculative," the court held that "the Board and the United States have not proven that Rivera was an actual victim of testing discrimination." S.A. 141.

As a result of the court's ruling, Rivera's retroactive seniority date for purposes of layoffs was changed from November 7, 1995, to February 4, 2000, the date of his permanent appointment as a custodian. See J.A. 145. Nonetheless, for purposes of transfers and temporary care assignments, the court allowed Rivera to keep his November 1995 seniority date. J.A. 145. The United States argued that Rivera's seniority date for all purposes should be October 27, 1997, the median hire date for Exam 1074. J.A. 4191.

B. Summary Judgment Was Inappropriate

Individuals can be victims of an unlawful exam even if they score high enough to be hired. See *Guardians Ass'n* v. *Civil Serv. Comm'n*, 633 F.2d 232, 248 n.30 (2d Cir. 1980), aff'd, 463 U.S. 582 (1983). Like the present case, *Guardians* involved a disparate-impact challenge to employment examinations. This Court concluded in *Guardians* that minority candidates could qualify as discrimination victims even though they were eventually hired by the defendant:

"There is no reason why the acceptance of a belated offer of employment should be deemed a waiver of the right to seek redress for a discriminatory delay [in hiring]." *Ibid.*; see also *Guinyard* v. *City of New York*, 800 F. Supp. 1083, 1088-1089 (E.D.N.Y. 1992) ("a delay in promotion may itself result in injury" in a disparate-impact claim involving employment exams); *Bradley* v. *City of Lynn*, 443 F. Supp. 2d 145, 168 (D. Mass. 2006) (a "delay in hiring alone constitutes adverse and disparate impact" where "the examination score determines both whether and *when* a candidate is certified or hired" and where the use of test scores to rank-order candidates has the effect of "bunch[ing] minorities at the bottom of the eligible list").

As this Court has properly recognized, where a challenged examination is used to rank-order candidates who pass the test, "evidence that the scores of members of a protected group were clustered at the low end of the grading scale – though such group members may have passed the examination in sufficient numbers – provides support for a finding that the test had a disparate impact on that group, assuming the clustering could not have occurred by chance." *Waisome* v. *Port Auth. of N.Y. & N.J.*, 948 F.2d 1370, 1377 (2d Cir. 1991). The United States presented evidence that the scores of Hispanic candidates who took Exam 1074 were clustered disproportionately at the low end of the scoring range as compared to the scores of whites. See p. 44, *supra*. Because the Board used the

test results on a rank-ordered basis, Hispanics' lower average scores meant that if they were hired at all, they were likely to be appointed later than the average white test-taker who passed the exam. See J.A. 2178; J.A. 1357-1358 (pp. 26-31).

In light of this evidence, the district court erred in rejecting Rivera's claim for relief as too "speculative." His claim is no more speculative than those of minorities who failed a challenged exam or scored too low ever to be hired. It is difficult, if not impossible, to predict whether any particular minority candidate who failed an unlawful exam would have passed a hypothetical test that complied with Title VII. Yet that uncertainty does not preclude such individuals from being considered victims of testing discrimination. (And any uncertainty in this regard must be resolved against the Brennan appellants, who bear the burden of proving that beneficiaries were not victims of discrimination. See pp. 38-43, *supra*.)

The court's ruling also produces nonsensical results. Under the court's reasoning, an Hispanic candidate who was never hired because he scored a few points *lower* than Rivera on Exam 1074 would be considered a victim of discrimination and would receive a retroactive seniority date significantly *earlier* than Rivera's. This is an untenable outcome. The unlawful exam has harmed Rivera and he is thus entitled to receive a retroactive seniority date that is no later than that awarded to minority beneficiaries who failed the test.

For these reasons, the district court erred in ruling, on summary judgment, that Rivera was not a victim of testing discrimination. Rivera is a victim and, as such, is entitled to a retroactive seniority date of October 27, 1997, for all purposes, including layoffs.

V

THE DISTRICT COURT ERRED IN CONCLUDING, ON SUMMARY JUDGMENT, THAT THE UNITED STATES FAILED TO ESTABLISH A *PRIMA FACIE* CASE OF RECRUITING DISCRIMINATION

(Cross-Appeal)

The district court held that the United States failed to establish a *prima facie* case of recruiting discrimination under a disparate-impact theory. S.A. 120. According to the court, the United States' evidence did not show a causal connection between the Board's recruiting practices and the statistical disparities in the racial and gender composition of the applicant pool. S.A. 66-67. As a result, the court held that the evidence was insufficient to show that any of the recruitment-claim beneficiaries was a discrimination victim. S.A. 101 n.3, 120-121. This ruling conflicts with the United States' position that four of those beneficiaries – Salih Chioke, Laura Daniele, Carl Smith, and Gerardo Villegas – are victims entitled to retroactive, competitive seniority for all purposes. J.A. 1114, 1118, 1142, 1146.

This Court should reverse the district court's holding on the recruitment claim and remand for an evidentiary hearing. Because the evidence raises a genuine issue of material fact as to the causation of the statistical disparities, summary judgment was inappropriate.

A. Background

In supporting its recruitment claim, the United States relied in part on the expert reports of Dr. Orley C. Ashenfelter, a labor economist, statistician, and tenured professor of economics at Princeton University. J.A. 546-563, 2734-2745. To determine the impact of the Board's recruitment practices, Dr. Ashenfelter compared (1) the pool of qualified actual applicants who took each of the challenged exams with (2) the "available labor pool," which he defined as the group of workers in the local work force who were "willing and able to perform the job in question." J.A. 547-548 ¶ 4.

To determine the available labor pool, he performed a complex analysis that took into account the qualifications and interests of workers in the local labor force. J.A. 1952-1953. He began by identifying each of the actual applicants who took one of the challenged exams and was found by the Board to be qualified for a custodian or custodian engineer position. J.A. 549-550 ¶¶ 8-11. Then he categorized those actual applicants according to the Census occupational group in which each was employed at the time of his or her application. Next, using

Census data, he looked at the racial, ethnic, and gender composition of those occupational groups within the local labor force, which included only individuals who both worked in New York City and resided in the tri-State area. J.A. 550-551 ¶ 12. In calculating the available labor pool, he weighted the occupational groups according to their distribution among the actual qualified applicants. J.A. 551 ¶ 13. Thus, for example, if 50% of *actual* qualified applicants came from occupational group *X*, he assumed that half of *potential* qualified applicants would come from the same occupational group.

Based on this statistical model, Dr. Ashenfelter found stark disparities between the number of qualified women and minorities who actually applied to take the exams and the number who would be expected to apply based on their representation in the available labor pool. J.A. 552-554 ¶¶ 16-24; J.A. 561-563. Dr. Ashenfelter concluded that these disparities were highly statistically significant and thus unlikely to have occurred by chance. J.A. 552-554, 561-563; see also J.A. 2790-2793 ¶¶ 7-12. Other parties produced expert reports supporting Dr. Ashenfelter's methodology and asserting that, if anything, his analysis was too conservative and thus underestimated the disparity between expected and actual qualified applicants. J.A. 1949-1956, 2798-2799, 2804-2808.

In addition, the United States and other parties produced anecdotal evidence suggesting a link between the excessive reliance on word-of-mouth advertising

and the scarcity of women and minorities in the applicant pool. This evidence included examples where qualified beneficiaries failed to apply for custodial positions because they never learned that exams were being given until after the fact. See p. 9, *supra*. The parties also produced evidence that when the Board expanded its recruitment in an effort to fill provisional custodial positions, it received many applications from minority and female candidates. See pp. 10-11, *supra*.

B. Summary Judgment Was Inappropriate

The district court erred in granting summary judgment on this claim. The court correctly recognized that, in order to establish a *prima facie* case of disparate-impact discrimination, a plaintiff must demonstrate a causal nexus between the challenged employment practice and the statistical disparity. See *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 655-657 (1989); 42 U.S.C. 2000e-2(k)(1)(A). But the court erred in concluding, on summary judgment, that a causal connection could not be inferred from the United States' evidence.

"Because statistical analysis, by its very nature, can never scientifically prove discrimination, *a disparate impact plaintiff need not prove causation to a scientific degree of certainty*." *EEOC* v. *Joint Apprenticeship Comm.*, 186 F.3d 110, 117 (2d Cir. 1999) (emphasis added). Accordingly, "a plaintiff may establish a prima facie case of disparate impact discrimination by proffering statistical

evidence which reveals a disparity substantial enough to raise an inference of causation. That is, a plaintiff's statistical evidence must reflect a disparity so great that it cannot be accounted for by chance." *Ibid*.

Reliance on inferences, rather than direct proof, of causation is particularly warranted in cases involving alleged recruitment discrimination. Direct proof of causation will rarely be available in such cases, simply because it is impossible to know with certainty who would have applied had the defendant used different recruitment practices. Cf. *Joint Apprenticeship Comm.*, 186 F.3d at 119 (noting difficulty of determining potential applicant pool where employer's announced job requirements may have deterred individuals from applying). The necessity of relying on estimates of the available qualified applicant pool does not undermine the United States' evidence of recruiting discrimination. See *Guardians Ass'n* v. *Civil Serv. Comm'n*, 633 F.2d 232, 240 (2d Cir. 1980) (holding that even though an expert "estimate[d] the racial and ethnic composition of the applicant pools," that fact "does not invalidate [his] conclusions": "Necessity often dictates that the composition of a given population be estimated by projecting data gathered by less than optimal means from only a sample of that population."), aff'd, 463 U.S. 582 (1983); see also J.A. 1951-1953 (expert's defense of Ashenfelter's reliance on Census data to estimate relevant labor pool); J.A. 2798-2799, 2804-2808 (same opinion from another expert).

The Brennan appellants criticize Dr. Ashenfelter's analysis by asserting that it fails to account for the qualifications and interests of those in the available labor pool. Br. 61. That assertion is incorrect. J.A. 1951-1953. Dr. Ashenfelter conducted a complex statistical analysis designed to identify those individuals in the local labor force likely to be both interested in and qualified for jobs as custodian or custodian engineer. J.A. 1952-1953. By controlling for these factors, Dr. Ashenfelter's analysis accounted for two of the most common non-discriminatory explanations why people choose not to apply for jobs. The most logical explanation left is that the Board's recruitment practices caused the disparities. The inference of causation is particularly strong because of the magnitude of the disparities in this case. See J.A. 561-563; J.A. 2790-2793 ¶¶ 7-12 (explaining probability that disparities occurred by chance).

The Brennan appellants cannot defeat the United States' statistical evidence simply by speculating that the disparities would disappear if Dr. Ashenfelter had used a different methodology or controlled for additional factors. In *Joint Apprenticeship Committee*, the defendant asserted "that the disparity between the characteristics of the potential applicants and the actual applicants [could] be attributed to a general lack of interest on the part of Blacks and women in becoming electricians." 186 F.3d at 120. This Court rejected that assertion,

concluding that the defendant's "unsupported conjectures and assertions that these missing factors would explain the disparities revealed by [plaintiff's] statistical evidence cannot operate to debunk those statistics." *Ibid.* Like the defendant in *Joint Apprenticeship Committee*, the Brennan appellants failed "to demonstrate that when the alleged missing factors are organized and accounted for, no significant disparity exists." *Ibid.*; accord *Bazemore* v. *Friday*, 478 U.S. 385, 403-404 n.14 (1986); see J.A. 1950-1951, 2274, 2279, 2283-2284, 2287-2288, 2290-2292.

In attacking the United States' statistical evidence, the Brennan appellants cite a witness's bald assertion that "very few minorities and women possessed the high-pressure steam license needed for the [custodian engineer] position." Br. 61. This assertion, which the Brennan appellants fail to back up with statistical evidence, does not justify summary judgment in their favor. Even if the witness's assertion were true (which the United States does *not* concede), it would not account for the statistical disparity found in the applicant pool for the custodian position, which did not require such a license. See Br. 13-14.

At the very least, the United States' evidence raised a genuine issue of material fact regarding causation that precluded summary judgment. Although the Brennan appellants produced an expert who criticized certain aspects of Dr.

Ashenfelter's analysis, both the Board and the Caldero intervenors produced their own experts who supported Dr. Ashenfelter's methodology and conclusions.

Moreover, the United States and the other parties produced anecdotal evidence bolstering the inference of causation. See pp. 9-11, 50-51, *supra*. Particularly significant is the evidence that a large number of qualified women and minorities applied for provisional custodian and custodian engineer positions when the Board expanded its recruitment efforts. This evidence undercuts the Brennan appellants' contention that a lack of qualifications or interest among women and minorities could fully explain the statistical disparities in the applicant pool for the permanent positions.

Finally, the Brennan appellants claim (Br. 17-19, 40) that the Board engaged in "extensive" recruitment efforts. Even if true, such efforts would at most raise a genuine issue of material fact as to whether a causal link existed between the Board's recruitment practices and the statistical underrepresentation of women and minorities in the applicant pool.

In any event, factual disputes exist even about the scope of the Board's recruitment efforts. Although the Board claimed that the City's Department of Personnel mailed exam notices to agencies and community organization that had asked to be on a mailing list (Br. 18-19), that Department's representative testified that he was not aware of existing records showing which agencies and

organizations were actually mailed notices about the challenged exams. See p. 10, *supra*.

Moreover, the Brennan appellants' brief creates a misleading impression about the extent of the Board's other efforts to publicize the exams. See Br. 17-19. In the entire City of New York, which has more than 1,200 public schools (J.A. 588 ¶ 2), the Board posted exam notices at only four buildings. See pp. 9-10, *supra*. And although some exam notices appeared in the local civil service newspaper, those notices often contained no information about the job duties or qualifications for the positions. See p. 10, *supra*.

Because of these factual disputes – regarding both the extent of the Board's recruitment efforts and the causal link between the Board's practices and the statistical disparity identified by Dr. Ashenfelter – summary judgment was inappropriate. Accordingly, this Court should vacate the district court's holding on the recruitment claim and remand for an evidentiary hearing.

VI

THE AWARDS OF RETROACTIVE, COMPETITIVE SENIORITY TO THE NON-VICTIMS IN THIS CASE ARE UNLAWFUL

(Cross-Appeal)

Relying on an affirmative-action theory, the district court upheld awards of retroactive, competitive seniority for purposes of transfers and temporary care assignments to 18 female beneficiaries of the recruitment claim, despite concluding that the evidence was insufficient to show that any of them was a discrimination victim. Of these 18 beneficiaries (S.A. 150), the United States contends that 16 of them are not discrimination victims and, given the facts of this case, are not entitled to *retroactive*, competitive seniority for any purpose. J.A. 1111-1113, 1117, 1119, 1121, 1123-1124, 1126, 1131, 1133, 1137, 1143-1144, 1147.[6] The court concluded, however, that these awards to non-victims were permissible gender-based affirmative action. This was error. The retroactive, competitive seniority awards to the non-victims in this case violate both the Equal Protection Clause and Title VII. (If the Court agrees that these awards violate Title VII, it need not, and should not, reach the constitutional issue.)

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[6] The United States' position is that one female beneficiary of the recruiting claim, Laura Daniele, is a discrimination victim. J.A. 1118. The United States takes no position on whether the remaining female recruitment-claim beneficiary, Elaine Farr, qualifies as a victim. J.A. 1119.

At the outset, the United States emphasizes that its argument here is narrow and is based on the facts of this particular case. With regard to the non-victim beneficiaries, the United States challenges the legality of only the awards of *retroactive*, *competitive seniority*. The government does not challenge the non-victims' *permanent appointments* under the settlement agreement or the other benefits that flow from those appointments, including (1) *non-retroactive*, competitive seniority (the seniority that an individual begins accruing when he or she starts working as a permanent employee), and (2) retroactive, *non-competitive* seniority (the type of seniority used to calculate, for example, pension benefits). Moreover, the United States takes no position in this appeal on whether, in a different case involving different facts, the Equal Protection Clause or Title VII might permit the award of retroactive, competitive seniority to individuals other than discrimination victims.

A. The Awards Of Retroactive, Competitive Seniority To The Non-Victims In This Case Violate The Equal Protection Clause

Under the Equal Protection Clause, gender-based classifications "are subject to heightened scrutiny," *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 728 (2003), a standard typically referred to as "intermediate scrutiny," *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988). "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *United States* v. *Virginia*, 518 U.S. 515, 531 (1996) (citations omitted). "Th[is]

burden of justification is demanding." *Id.* at 533. Thus, to defend gender-based action, the governmental entity "must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Ibid.* (internal quotation marks omitted).

The evidence in this case satisfies the "important governmental objectives" requirement. As previously explained, the United States presented sufficient statistical and anecdotal evidence to establish a *prima facie* case of recruitment discrimination against minorities and women. See pp. 48-56, *supra*. Remedying such discrimination qualifies as an important governmental objective, and the United States' evidence provided a sufficient factual predicate for the Board to believe that such discrimination had occurred.

Nonetheless, the award of retroactive, competitive seniority to the non-victim beneficiaries in this case is unlawful under the Equal Protection Clause because such relief is not "substantially related" to the Board's goal of remedying discrimination. Rather than furthering that objective, the awards of retroactive, competitive seniority to the non-victim beneficiaries work at cross-purposes with the goal of correcting past discrimination.

First, several of these non-victims have received competitive seniority dates that are earlier – years earlier, in some instances – than the seniority dates assigned

to some actual victims of the Board's discrimination. For example, some of the non-victim beneficiaries have received competitive seniority retroactive to January 23, 1989 – a date that is eight to eleven years earlier than the seniority dates to which they were entitled. Compare S.A. 150 (dates for Caldero, DiDonato, Kachadourian, and Tatum) with J.A. 1111, 1119, 1124, 1144 (cols. D & E). By contrast, Sylvia Ortega de Green, a minority female custodian who is a victim of testing discrimination, received a seniority date of June 16, 1995 (S.A. 149), meaning that she now has about six and a half years less seniority than some of the non-victim beneficiaries. This is not an isolated example. Six minority beneficiaries who the United States believes are discrimination victims received seniority dates that are later than the seniority dates awarded to 15 of the non-victim beneficiaries. Compare S.A. 149 (dates for Casado, Fernandez, Maldonado, Martinez, Ortega de Green, and Sean Rivera) with S.A. 150 (dates for Caldero, Calderon, Chellemi, DiDonato, Ellis, Gabrielson, Jarrett, Kachadourian, Luebkert, Manousakis, Morton, Quinn, Sullivan, Tatum, and Wolkiewicz). Affirmative action cannot be substantially related to the goal of correcting discrimination if it harms discrimination victims.

Second, non-victims also have received seniority dates that are earlier than those assigned to some female and minority incumbents who were hired as permanent employees long before the settlement agreement was negotiated and

who are not beneficiaries of that agreement. For example, Karen Wuench, a non-beneficiary who became a permanent custodian in June 1990, now has about 17 months less seniority than some of the non-victim beneficiaries. Compare J.A. 1604 ¶¶ 2-4, with S.A. 150 (listing January 1989 as retroactive seniority date for some non-victim beneficiaries). And appellant Ruben Miranda, a non-beneficiary Hispanic employee who became a permanent custodian in October 1990, now has about 21 months less seniority than some of the non-victims who started working as permanent employees much later. Compare J.A. 1794 (Miranda seniority date), with S.A. 150; see also J.A. 1608-1609 ¶¶ 3-6 (similar situation for another Hispanic incumbent). Penalizing innocent female and minority incumbents does not further the goal of remedying discrimination.

Third, some of the non-victim beneficiaries actually benefitted from the very recruitment practices (particularly word-of-mouth advertising) that were the focus of the United States' recruitment claim. See p. 14, *supra*. A result that unjustly rewards individuals who profited from unlawful discrimination at the expense of actual discrimination victims cannot be considered substantially related to the goal of remedying that discrimination. Cf. *Orr* v. *Orr*, 440 U.S. 268, 282-283 (1979) (invalidating a gender-based classification that, although allegedly

designed to remedy discrimination against women, actually benefitted women who were least likely to have suffered such discrimination).

Moreover, to the extent the Board's objective was to increase the representation of women and minorities in the custodial workforce, the grant of retroactive, competitive seniority to non-victims does nothing to further that goal. No one in this litigation is arguing that the non-victim beneficiaries should be dismissed from the custodian or custodian engineer positions they were awarded under the settlement agreement. See p. 58, *supra*; S.A. 121. It was the *appointment* of women and minorities to these positions – not the award of retroactive, competitive seniority – that changed the gender and racial composition of the workforce. Overturning the award of retroactive, competitive seniority to non-victims would be highly unlikely to undo these demographic changes.[7] For these reasons, the awards of retroactive, competitive seniority to the non-victim beneficiaries in this case violate the Equal Protection Clause.

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[7] As far as the United States is aware, rescinding the *retroactive*, competitive seniority to these non-victims would not place them at risk of being laid off. The district court held that the non-victim female beneficiaries of the recruitment claim may retain, *even for layoff purposes*, the non-retroactive, competitive seniority they began earning when they were appointed to permanent positions. J.A. 4219. Because those individuals have been working for the Board in permanent positions for more than nine years, they have accrued a substantial amount of *non-retroactive*, competitive seniority that would likely protect them from job loss even if the Board were to lay off custodians and custodian engineers in the future.

B. Title VII Bars The Awards Of Retroactive, Competitive Seniority To The Non-Victims In This Case

Race- or gender-based affirmative action satisfies Title VII if (1) it is designed to correct a "manifest imbalance" in a "traditionally segregated job category," and (2) it does not "unnecessarily trammel[]" the interests of innocent third parties or "create[] an absolute bar to their advancement." *Johnson* v. *Transportation Agency*, 480 U.S. 616, 631-632, 637-640 (1987); *United Steelworkers of Am.* v. *Weber*, 443 U.S. 193, 197, 208-209 (1979). In this case, the awards of retroactive, competitive seniority to non-victims violate Title VII because they "*unnecessarily* trammel[]" the interests of innocent third parties, *Johnson*, 480 U.S. at 637 (emphasis added).

The awards of retroactive, competitive seniority to non-victims was simply unnecessary to correct any "manifest imbalance" (*Johnson*, 480 U.S. at 631-632) in the gender and racial composition of the custodial workforce. Although the *appointment* of the beneficiaries to custodial jobs (something that no party is challenging) might help correct a gender or racial imbalance in the demographics of the workforce, the award of retroactive, competitive seniority to the non-victims in this case does nothing to further that goal.

Not only are such seniority awards unnecessary, but they also substantially penalize innocent individuals. As explained above with regard to the equal protection violation, the awards of retroactive, competitive seniority to the non-

victims in this case harm not only white males, but also innocent female and minority incumbents, including some individuals who themselves are victims of discrimination. See pp. 59-61, *supra*. Under these circumstances, the award of retroactive, competitive seniority to the non-victims results in the "unnecessar[y] trammel[ing]" that Title VII forbids, *Johnson*, 480 U.S. at 637.

VII

THE AWARDS OF RETROACTIVE, COMPETITIVE SENIORITY TO THE TESTING-CLAIM BENEFICIARIES ARE UNLAWFUL TO THE EXTENT THEY EXCEED MAKE-WHOLE RELIEF

(Cross-Appeal)

Although the United States believes that all of the testing-claim beneficiaries are actual victims of discrimination entitled to make-whole relief, post-remand discovery revealed that 12 of them[8] received competitive seniority dates under the settlement agreement that are earlier (in most cases, about two years earlier) than the seniority dates they would have received absent discrimination. Compare S.A. 149, with J.A. 1110, 1113, 1120, 1124, 1128-1130, 1132-1133, 1135, 1139 (cols. C & D). Consequently, the United States urged the district court to adjust these individuals' competitive seniority dates so that they do not exceed make-whole relief. *Ibid.*

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[8] Pedro Arroyo, Jose Casado, Celestino Fernandez, Kevin LaFaye, Steven Lopez, Anibal Maldonado, Vernon Marshall, James Martinez, Wilbert McGraw, Sylvia Ortega de Green, Nicholas Pantelides, and Sean Rivera.

But the district court declined to decide whether the seniority awards to these 12 testing-claim beneficiaries were limited to make-whole relief. In the court's view, this inquiry was unnecessary because the seniority awards could be upheld for purposes of transfers and temporary care assignments under an affirmative-action theory, regardless of whether they exceeded make-whole relief.

That decision was error. To the extent they exceed make-whole relief, the awards of retroactive, competitive seniority to these 12 individuals violate the Equal Protection Clause and Title VII. (If the Court holds that these awards violate Title VII, it can and should avoid deciding the equal protection question.)

In challenging these awards, the United States reiterates that its argument here is a narrow one limited to the facts of this case. See p. 58, *supra*. With regard to these 12 testing-claim beneficiaries, the United States challenges only a portion of their awards of *retroactive, competitive seniority*. The government is not contending in this appeal that any other aspect of the relief they received violates equal protection or Title VII. Specifically, the United States is not challenging any portion of the awards of retroactive, *non-competitive* seniority that these 12 individuals received, even though such awards went beyond make-whole relief.

A. In The Context Of This Case, The Equal Protection Clause Bars Awards Of Retroactive, Competitive Seniority That Exceed Make-Whole Relief

In order to survive strict scrutiny under the Equal Protection Clause, race-based affirmative action must be narrowly tailored to further a compelling governmental interest.[9] *Grutter* v. *Bollinger*, 539 U.S. 306, 326 (2003). To satisfy the compelling-interest prong of the strict scrutiny test, a governmental entity that adopts race-based classifications must have a "strong basis in evidence for its conclusion that remedial action was necessary." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 500, 510 (1989) (citation omitted). This showing was met here. Remedying one's own past discrimination is undoubtedly a compelling interest. *Hayden* v. *County of Nassau*, 180 F.3d 42, 51 (2d Cir. 1999). And the disparate impact of the challenged exams on African Americans and Hispanics, especially when combined with evidence that the tests were not job-related or consistent with business necessity, provided the Board a strong basis in evidence for concluding that it had discriminated and that action was needed to remedy such discrimination.[10]

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[9] The same standard applies to affirmative action based on national origin. *Jana-Rock Constr., Inc.* v. *New York State Dep't of Econ. Dev.*, 438 F.3d 195, 200 n.1 (2d Cir. 2006). This brief uses the term "race-based" to include actions based on national origin.

[10] Contrary to the Brennan appellants' suggestion (Br. 68-71), compliance with Title VII's disparate-impact provisions is a compelling governmental interest. Although the Supreme Court has not squarely held that state actors have a

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But the awards of retroactive, competitive seniority in this case fail the narrow-tailoring requirement to the extent they exceed make-whole relief.[11] To determine whether race-based relief is narrowly tailored, courts typically consider the following factors: (1) the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of the numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of third parties. See *United States* v. *Paradise*, 480 U.S. 149, 171 (1987) (plurality); *Jana-Rock Constr., Inc.* v. *New York State Dep't of Econ. Dev.*, 438 F.3d 195, 205-206 (2d Cir. 2006).[12]

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[10](...continued)
compelling interest in avoiding practices with disparate racial effects, the Court has consistently assumed it in the analogous context of the so-called "results test" of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973(a), see, *e.g.*, *Bush* v. *Vera*, 517 U.S. 952, 977 (1996) (plurality), and a number of Justices have clearly endorsed the proposition, *id.* at 990, 992, 994 (O'Connor, J., concurring); *id.* at 1033-1034 (Stevens, J., joined by Ginsburg & Breyer, JJ., dissenting); see also *id.* at 1065 (Souter, J., dissenting).

[11] This conclusion does not conflict with the United States' position in the previous appeal in this case. There, the United States argued that all of the competitive seniority awards satisfied strict scrutiny. But the United States made that argument based upon the good-faith understanding from reviewing the record that all of the seniority awards were make-whole relief for victims of discrimination. See *Brennan* v. *New York City Bd. of Educ.*, 260 F.3d 123, 130 (2d Cir. 2001). Post-remand discovery revealed that some of the beneficiaries were not, in fact, discrimination victims and that others, although actual victims, had received seniority awards that exceeded make-whole relief. See p. 14, *supra*. This evidence shed new light on the necessity of some of the seniority awards, as well as the relative burden of those awards on innocent third parties.

[12] One of the narrow-tailoring factors – the relationship of numerical goals to
(continued...)

The key factor here is the first one – the necessity of the race-conscious relief and the efficacy of alternative remedies. "Narrow tailoring requires 'serious, good faith consideration of workable race-neutral alternatives,'" *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2760 (2007) (quoting *Grutter*, 539 U.S. at 339), and race-based affirmative action must "be no broader than demonstrably necessary." *Jana-Rock*, 438 F.3d at 207. In the present case, the Board has available a race-neutral mechanism that will fully remedy the effects of its discriminatory exams. The Board can identify actual victims of its discriminatory exams and then easily calculate the retroactive relief that would make them whole for the injury they have suffered.

In addition, the impact on innocent third parties confirms that the awards of retroactive, competitive seniority are unconstitutional to the extent they exceed make-whole relief. Those innocent parties include both white and minority incumbents.

Especially troubling is the fact that 12 beneficiaries of the testing claim have received undeserved seniority preferences over other discrimination victims and over other minority employees who are not beneficiaries of the settlement. Under the district court's ruling, for example, beneficiary Nicholas Pantelides received a retroactive seniority date of January 1989 for purposes of transfers and

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[12](...continued)
the relevant labor market – seems irrelevant here.

temporary assignments (S.A. 149) – more than eight and a half years earlier than the make-whole seniority date to which he was entitled. See J.A. 1135 (col. C). That puts other discrimination victims, such as beneficiary Anibal Maldonado, at a significant and unfair competitive disadvantage. If all of the seniority awards had been limited to make-whole relief, Maldonado would have a seniority date *earlier* than Pantelides' date. Compare J.A. 1135 with J.A. 1130 (col. C). But, as a result of the court's ruling, Maldonado now has a seniority date that is about *six and half years later* than the seniority date Pantelides received for purposes of transfers and temporary care assignments. S.A. 149.

Finally, although the awards of seniority are a one-time event, the effects of those awards will likely persist for many years because, as long as they remain employed by the Board, the 12 beneficiaries can repeatedly use their seniority preferences in competitions for inter-school transfers. "[S]eniority, after all, is a right which a worker exercises in each job movement in the future, rather than a simple one-time payment for the past." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 768 n.28 (1976) (citation omitted).

In combination, these factors show that the awards of retroactive, competitive seniority to the testing-claim beneficiaries cannot withstand strict scrutiny to the extent they go beyond make-whole relief.

B. The Awards Of Retroactive, Competitive Seniority In This Case Also Violate Title VII To The Extent They Exceed Make-Whole Relief

Race- or gender-based affirmative action is unlawful under Title VII if it "unnecessarily trammel[s]" the interests of innocent third parties or "create[s] an absolute bar to their advancement." *Johnson* v. *Transportation Agency*, 480 U.S. 616, 637-640 (1987); see p. 63, *supra*. To the extent they exceed make-whole relief, the retroactive, competitive seniority awards to the 12 testing-claim beneficiaries violate Title VII because they unnecessarily trammel the interests of innocent third parties. As explained, these 12 individuals have arbitrarily received an undeserved competitive advantage not only over white incumbents but also over some minority employees, including actual victims of discrimination. See pp. 68-69, *supra*.

Awarding retroactive, competitive seniority that exceeds make-whole relief is unnecessary to accomplish the goal of eliminating the racial imbalance in the Board's custodial workforce. Although the beneficiaries' *permanent appointments* affected the racial composition of the workforce, their awards of retroactive, competitive seniority did not. Thus, correcting any racial imbalance in the custodial workforce can be accomplished just as effectively by limiting the competitive seniority awards to make-whole relief for each of the testing-claim beneficiaries. See pp. 62-63, *supra*.

Because the awards of retroactive, competitive seniority in excess of make-whole relief violate the Equal Protection Clause and Title VII, this Court should vacate those awards and direct the district court on remand to adjust the seniority dates of the affected beneficiaries.

VIII

NON-VICTIM BENEFICIARIES SHOULD NOT BE STRIPPED OF ALL COMPETITIVE SENIORITY

(Cross-Appeal)

The district court held that the Fourteenth Amendment barred the awards of *any* competitive seniority to the non-victim minority male beneficiaries of the recruitment claim. S.A. 147 ¶ 3; S.A. 7, 88, 90; S.A. 135-137 & n.5; J.A. 4218; S.A. 121-123. As a result of the district court's decision, these beneficiaries will be stripped of *all* of the *non-retroactive*, competitive seniority that they began earning when they received their permanent appointments under the settlement agreement.

Indeed, it appears that the court's ruling will prevent these beneficiaries from accruing any competitive seniority in the future so long as they remain in the permanent positions they were awarded under the agreement. Consequently, in any competition in which seniority matters, these beneficiaries will always be placed at the bottom of the seniority rankings, even below workers who just started working for the Board.

This outcome is an untenable – and, as far as we can determine, an unprecedented – result that unjustly and unnecessarily penalizes innocent beneficiaries for the mistakes made by the United States and the Board in initially determining which individuals should receive relief under the settlement agreement. By ordering such a harsh result, the district court abused its discretion.

The district court's ruling is unnecessary to make the Brennan appellants whole for any injury they may have suffered. The alleged constitutional and statutory injuries to the Brennan appellants could be fully remedied by *reducing* (rather than completely eliminating) the non-victim beneficiaries' competitive seniority, perhaps by postponing the date on which they would begin accruing seniority. Alternatively, the court might enter a ruling that would allow the non-victim beneficiaries to retain at least some of their appointment-date seniority for competitive purposes when competing against individuals *other than the Brennan appellants*. Stripping the non-victim beneficiaries of all competitive seniority and precluding them from *ever* accruing such seniority goes far beyond make-whole relief for the Brennan appellants.

Moreover, the district court failed to give adequate consideration to the harmful effects of its ruling on the innocent non-victim beneficiaries. See *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 374-376 (1977) (concluding that courts in employment discrimination cases should take into

account the legitimate expectations of innocent non-victim employees in deciding an appropriate remedy). Several of the non-victim beneficiaries detrimentally relied on their permanent appointments (and the competitive seniority that naturally flowed from those appointments) in making career choices and taking on financial obligations. See, *e.g.*, J.A. 2577; J.A. 638 ¶ 10; J.A. 672-673 ¶¶ 10-11, 13; J.A. 678 ¶¶ 11-12.

Indeed, some of the minority beneficiaries of the recruitment claim turned down other job offers from the Board because they already had received permanent appointments under the settlement agreement. These individuals (including Salih Chioke, Frank Valdez, and Gerardo Villegas) had passed Exam 7004 (which the United States has not challenged in this litigation) and were eligible for permanent appointments in 2001 or 2002 based on their performance on that test. J.A. 4362-4363 ¶¶ 45-48; J.A. 678 ¶¶ 11-12; J.A. 3845 (p. 65); J.A. 2577; J.A. 1146 (col. D). Had they accepted those appointments, they would have accrued several years of competitive seniority by now. At the very least, the district court should allow these non-victim beneficiaries to retain a portion of their non-retroactive, competitive seniority equal to the seniority they would have earned had they accepted the permanent appointments based on the results of

Exam 7004. Doing so would simply return them to the place they would have occupied had there never been a settlement.

In sum, the district court abused its discretion in stripping male beneficiaries of the recruitment claim of all competitive seniority. This Court should vacate that decision and remand the case with instructions to enter an appropriate ruling that redresses any injury the Brennan appellants may be found to have suffered without unduly harming the innocent non-victims.

CONCLUSION

This Court should affirm the district court's judgment with respect to Issue 2, and should vacate the judgment as to the remaining issues and remand for further proceedings consistent with the positions taken in this brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation imposed by Rule 28.1(e)(2)(B)(i). The brief was prepared using WordPerfect 12 and contains 15,853 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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August 21, 2009

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I hereby certify that on August 21, 2009, two copies of the foregoing FINAL BRIEF FOR THE UNITED STATES AS APPELLEE-CROSS-APPELLANT, AND FOR THE ATTORNEY GENERAL, ASSISTANT ATTORNEY GENERAL, AND DEPARTMENT OF JUSTICE AS APPELLEES were served by first-class mail, postage prepaid, on each of the following:

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CASE NAME: United States v. New York Board of Education, et al.

DOCKET NUMBER: 08-5171-cv(L), 09-5172-cv (xap), 08-5173-cv (xap), 08-5375-cv (xap), 08-5149-cv (con), 08-4639-cv (con)

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